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and Al-Buhaira National Insurance Co.*

**FILED**

DISTRICT COURT OF GUAM

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MARY L.M. MORAN  
CLERK OF COURT

UNITED STATES DISTRICT COURT  
DISTRICT OF GUAM

UNITED STATES OF AMERICA,

Plaintiff,

v.

MARWAN SHIPPING & TRADING CO.,  
FIVE SEAS SHIPPING CO., LLC AND S.J.  
GARGRAVE SYNDICATE 2724, IN  
PERSONAM, NAVIGATORS PROTECTION  
& INDEMNITY, AND AL-BUHAIRA  
NATIONAL INSURANCE COMPANY,

Defendants

AND CROSS-CLAIMS, COUNTERCLAIMS,  
THIRD-PARTY COMPLAINT, AND CLAIM  
IN INTERVENTION.

NO. CIV06-00011

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN OPPOSITION TO  
GARGRAVE SYNDICATE 2724'S  
MOTION TO DISMISS CROSS-CLAIM  
OR ALTERNATIVELY TO STAY THE  
CROSS-CLAIM**

Accompanying Documents: Opposition;  
Declaration of John E.D. Powell; Table of  
Foreign Authorities; Proposed Order

Complaint Date: April 19, 2006  
Trial Date: Not set

**I. RELIEF REQUESTED**

Defendants and Cross-claimants Marwan Shipping & Trading Company and Five Seas Shipping Company, LLC (collectively, "Marwan") respectfully request that this Court deny Defendant and Cross-claimant Gargrave Syndicate 2724's ("Gargrave") motion to dismiss or

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**ORIGINAL**

1 stay the cross-claims brought against it by Marwan ("Marwan Cross-claims"). Gargrave's  
2 motion is premised on an incomplete presentation of the facts, and the omitted information  
3 clearly establishes that this Court is the proper forum for the resolution of the Marwan Cross-  
4 claims. In its motion, Gargrave neglects to mention the existence, much less address the impact,  
5 of its own cross-claims against Marwan, which go to the same issues and rely on the same  
6 factual record as the Marwan Cross-claims. Additionally, Gargrave misleads the Court by  
7 failing to reveal all of the terms of its insurance agreement with Marwan, and instead, providing  
8 only the Cover Note and omitting the underlying insurance policy. This policy expressly  
9 provides that in the event Gargrave fails or refuses to pay any amount claimed to be due, it will  
10 "submit to the jurisdiction of a court of competent jurisdiction within the United States of  
11 America" at Marwan's request.

12 For these and additional reasons, the Marwan Cross-claims should be permitted to  
13 proceed to trial before this Court. The Marwan Cross-claims arise out of the same nexus of fact  
14 as all of the other claims at issue in this litigation, and the prompt and complete disposition of the  
15 other parties' claims will require this Court to make findings that go to the very heart of the relief  
16 Marwan seeks. Therefore, Gargrave's motion should be denied.

## 17 II. STATEMENT OF FACTS

18 In August 2004, the M/V AJMAN 2, suffering mechanical problems and running low on  
19 fuel, sought permission from the U.S. Coast Guard to enter Apra Harbor, Guam, in order to seek  
20 protection from an oncoming typhoon. Declaration of John E.D. Powell in Support of  
21 Opposition to Motion to Dismiss ("Powell Decl."), ¶ 2. Pursuant to regulations governing vessel  
22 access to U.S. waters, the Coast Guard required Marwan, as the general agent and manager of the  
23 M/V AJMAN 2, to secure oil pollution insurance and a certificate of financial responsibility  
24 ("COFR") demonstrating an ability to reimburse the U.S. for any damages incurred as a result of  
25 actual or threatened oil pollution. *Id.*; 33 U.S.C. § 2701, *et seq.*

1 In compliance with the Coast Guard's request, Marwan contacted Navigator's Protection  
2 & Indemnity ("Navigator's"), Gargrave's coverholder, to arrange for the required pollution  
3 insurance and COFR guaranty. Powell Decl., ¶ 2. Navigator's instructed Ropner Insurance Ltd.  
4 to broker an insurance policy through Environmental Protection Group, LLC ("EPG"), a United  
5 States insurer of marine pollution risks, on behalf of Gargrave. Id. As soon as Marwan was  
6 issued vessel pollution insurance No. 04HV123X0005 on or about August 19, 2004, EPG  
7 executed a COFR guaranty designating Gargrave as the guarantor. Powell Decl., Ex. A and B.  
8 The COFR guaranty stated that the M/V AJMAN 2 was insured by Gargrave against liability for  
9 costs and damages that Marwan may be subject to under certain federal environmental and  
10 pollution laws. Powell Decl., Ex. B. It also stated that "the Insurer consents to be sued directly  
11 with respect to any claim, including any claim by right of subrogation, for costs and damages  
12 arising under [certain sections of the Oil Pollution Act of 1990 ("OPA")] or [the Comprehensive  
13 Environmental Response, Compensation, and Liability Act ("CERCLA")] against any Assured."  
14 Id. The COFR guaranty designated a New York agent for any related service of process on  
15 Gargrave. Id.

16 The M/V AJMAN 2 was subsequently allowed to enter Apra Harbor, Guam. A few days  
17 later, the M/V AJMAN 2 dragged anchor and ran aground. Powell Decl., ¶ 2.

18 The Coast Guard effected removal of the vessel from the beach and, on April 19, 2006,  
19 the United States brought suit against Marwan, Five Seas, and Gargrave in the United States  
20 District Court of Guam, alleging that the defendants were subject to financial liability pursuant to  
21 OPA. Complaint, Docket Item No. 1. Specifically, the United States alleged that Marwan and  
22 Five Seas, as owners, operators and charterers of the vessel M/V AJMAN 2, were primarily  
23 responsible for costs incurred by the Coast Guard in connection with its removal and pollution  
24 abatement operation. Id. The United States further alleged that because Gargrave provided  
25 insurance, certain guaranties and evidence of financial responsibility pertaining to marine oil  
26

1 pollution liabilities incurred by the M/V AJMAN 2, it also was liable for certain removal and  
2 abatement damages. Id.

3 Marwan and Five Seas tendered the defense, indemnity, and guaranty obligations to  
4 Gargrave pursuant to the terms of the OPA insurance and COFR guaranty. Powell Decl., ¶ 6.  
5 Gargrave rejected this tender. Id. On July 12, 2006, Gargrave answered the complaint solely on  
6 its own behalf, raised counterclaims against the United States and asserted seven cross-claims  
7 against Marwan, including:

- 8 • Equitable indemnity, alleging that Marwan is primarily liable to the United States due to  
9 its “active and primary fault and breaches of obligations, duties of care and contract...”  
10 and that Gargrave is entitled to full indemnification for any judgment obtained against it  
11 by the United States.
- 12 • Contribution, alleging that Gargrave is entitled to recover from Marwan any amounts in  
13 excess of its proper liability for damages due to Marwan’s breach of contract and duties  
14 to the vessel, the United States, and others.
- 15 • Fraud and Misrepresentation, alleging that Marwan issued knowingly false information to  
16 Gargrave in connection with its application for a COFR and seeking to rescind and void  
17 the COFR guaranty Gargrave ultimately issued.
- 18 • Nondisclosure, alleging that Marwan intentionally failed to provide certain information to  
19 Gargrave in its application for a COFR and seeking to rescind and void the COFR  
20 guaranty Gargrave ultimately issued.
- 21 • Negligence, alleging that Marwan negligently filed a false and incomplete COFR  
22 application and seeking to rescind the COFR guaranty Gargrave ultimately issued.
- 23 • Tort of another, alleging that Gargrave was compelled to litigate this matter because  
24 Marwan “made misrepresentations and omissions, acted negligently, willfully and  
25 carelessly and breached various contracts and other agreements in connection with the  
26 ownership, chartering, crewing, operation and husbanding of the M/V AJMAN 2.”
- Declaratory relief, alleging that Gargrave is entitled to a declaration of its rights and  
obligations under the COFR guaranty and a declaration that it is not obligated to insure  
and/or indemnify Marwan for any obligations of the AJMAN 2.

Answer to Complaint, Crossclaim against Marwan Shipping and Trading Co., Five Seas  
Shipping Co., LLC., Counterclaim against USA, Docket Item No. 17. Gargrave asserted that the

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1 Court had pendent and/or ancillary jurisdiction over its cross-claims due to their relation to the  
2 underling federal maritime claims of the United States. Id.

3 Marwan brought three cross-claims of its own against Gargrave on January 24, 2007,  
4 alleging that Gargrave improperly refused to honor the COFR Guaranty and underlying OPA  
5 insurance contract . Crossclaim against S.J. Gargrave Syndicate, Docket Item No. 95. By the  
6 motion now before this Court, Gargrave moves to dismiss these cross-claims, alleging that they  
7 are precluded by an English jurisdiction clause in the Cover Note of the parties' insurance  
8 agreement, which states: "This Insurance shall be governed by and construed in accordance with  
9 the laws of England and the exclusive jurisdiction of the English courts. The seat of arbitration  
10 shall be London[.]" Motion to Dismiss, Docket Item No. 103; Declaration of Myles Sunley  
11 ("Sunley Decl."), Docket Item No. 107, Ex. D. The Cover Note also states, however, as a  
12 "condition," that it is subject to the terms of London Vessel Pollution Insurance Policy LSW  
13 1220 (3/99)(the "Policy"), which contains the following provision:

14 It is agreed that in the event of the failure of the Underwriters hereon to pay any  
15 amount claimed to be due hereunder, the Underwriters, at the request of the  
16 Assured, will submit to the jurisdiction of a court of competent jurisdiction within  
the United States of America.

17 Powell Decl., Ex. A. Pursuant to the Policy, Gargrave also consented to service of any such suit  
18 and agreed to be bound by any resulting decision of a United States court:

19 It is further agreed that the Assured may serve process upon Underwriters'  
20 representatives as provided in Item 7 of the Declarations and that in any suit  
21 instituted against any of them upon this contract the Underwriters will abide by  
the final decision of the Court or of any Appellate Court in the event of an appeal.

22 Id. The agreement further granted Gargrave similar authority to bring suit against Marwan in the  
23 United States, as well as the right to seek to remove any such case from state to federal court, to  
24 remand it from federal to state court, or to transfer venue among state or federal courts. Id.  
25 Tellingly, it is these provisions of the Policy—reserving to the insured the right to sue Gargrave  
26 in the courts of the United States if it refuses to pay Marwan's claims under the Policy—that  
Gargrave fails to reveal to this Court.

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#### IV. ARGUMENT AND AUTHORITY

Gargrave asserts that the Cover Note to the OPA insurance policy contains an enforceable forum selection clause requiring arbitration in England and that as a result, this Court lacks subject matter jurisdiction and venue over the Marwan Cross-claims. The Ninth Circuit has stated that it will analyze a contract-based forum dispute as a venue challenge pursuant to FRCP 12(b)(3); it has not recognized the application of FRCP 12(b)(1) to the issue. Argueta v. Banco Mexicano, S.A., 87 F.3d 320, 324 (9<sup>th</sup> Cir. 1996). “[I]n the context of a Rule 12(b)(3) motion based upon a forum selection clause, the trial court must draw all reasonable inferences in favor of the non-moving party and resolve all factual conflicts in favor of the non-moving party...” Murphy v. Schneider National, Inc., 362 F.3d 1133, 1138 (9<sup>th</sup> Cir. 2004). “As a result, at least until facts are resolved, in many cases the non-moving party will survive the 12(b)(3) motion.”<sup>1</sup> Id. at 1139. In the present case, there is a heated dispute regarding the acts

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1 and intentions surrounding the OPA insurance policy and COFR guaranty, as well as the parties'  
2 representations regarding the condition and operation of the M/V AJMAN 2 in Apra Harbor in  
3 August 2004. Powell Decl., ¶ 8. (Gargrave itself challenges the validity and enforceability of  
4 the insurance policy that contains the English jurisdiction clause it now relies upon.<sup>2</sup>) For  
5 purposes of this motion, any factual disputes must be resolved in Marwan's favor.

6 **A. The rules of contract interpretation do not support Gargrave's analysis.**

7 The Cover Note provision on which Gargrave bases its Motion to Dismiss is not as clear  
8 or complete as Gargrave would lead this Court to believe. Rather, a careful examination of the  
9 Cover Note provision and the underlying insurance Policy, viewed together, demonstrate that the  
10 language is ambiguous. First, the clause that Gargrave cites is internally unclear. It states that  
11 "this insurance" shall be subject to the jurisdiction of the English courts, but does not make any  
12 reference to the parties or their disputes, leaving the scope of the provision undefined. The  
13 provision also purports to grant exclusive jurisdiction to the English courts while at the same  
14 time making reference to arbitration. Second, the insurance Policy, which Gargrave wholly  
15 failed to reveal or address in its motion, contains a service of suit clause that expressly provides  
16 for litigation in the United States. Paragraph 14 of the Policy states that "in the event of the  
17 failure of the Underwriters hereon to pay any amount claimed to be due hereunder," Gargrave  
18 will submit to suit in the United States at Marwan's request. It also provides that in any such suit  
19 instituted against Gargrave "upon this contract," it will "abide by the final decision of the Court  
20

21 F.3d 338, 345 (3<sup>rd</sup> Cir. 2003). A motion to dismiss cannot be maintained under FRCP 12(b)(1)  
22 because although that defense cannot be waived, the right to arbitrate can be. See, e.g., Hoffman  
23 Const. of Oregon v. Active Erectors and Installers, Inc., 969 F.2d 796 (9<sup>th</sup> Cir. 1992); Frye v.  
Paine Webber, Jackson & Curtis, Inc., 877 F.2d 396 (5<sup>th</sup> Cir. 1989).

24 <sup>2</sup> In this regard, Gargrave's position is inconsistent. If it truly believes that the COFR guaranty  
25 and underlying insurance contract are void or subject to rescission, it cannot also seek to  
26 selectively enforce a provisions contained within these agreements. See, e.g., Evolution Online  
Systems, Inc. v. Koninklijke PTT Nederland N.V., 145 F.3d 505 (2<sup>nd</sup> Cir. 1998) ("Thus, if no  
contract exists, the language of the forum-selection clause cannot logically deprive Evolution of  
its significant right of access to the courts of the United States.").

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1 or of any Appellate Court in the event of an appeal.” Further, Gargrave consents to accept  
2 service of process and agrees to enter a general appearance “in the event any such suit shall be  
3 instituted.” Although the federal courts and most state courts have done away with the  
4 distinction between general and special appearances, this provision indicates that Gargrave has  
5 agreed to appear without objection in the event it is sued in the United States, subject to its right  
6 to seek removal, remand, or transfer of venue to another federal or state court in the United  
7 States.

8 The ambiguity created by these provisions should be resolved in favor of allowing the  
9 Marwan Cross-claims to proceed before this Court. Although the Cover Note contains language  
10 that Gargrave construes as a choice of law provision that requires the application of English law,  
11 its scope is ill-defined and Marwan does not concede its applicability. However, regardless of  
12 whether United States or English law is applied, the result is the same: the Marwan Cross-claims  
13 should not be dismissed or stayed.

14 **1. Applying United States canons of contract interpretation, Gargrave’s motion**  
15 **must fail.**

16 It is a long-settled rule of insurance law that when ambiguities exist in the language of an  
17 insurance policy, they must be liberally construed in favor of the insured. Stroehmann v.  
18 Mutual Life Ins., Co. of New York, 300 U.S. 435, 439, 57 S.Ct. 607 (1937) (“The rule is settled  
19 that in case of ambiguity that construction of the policy will be adopted which is most favorable  
20 to the insured.”). “[A]ny ambiguity or uncertainty in an insurance policy is to be resolved  
21 against the insurer.” Reserve Insurance Co. v. Pisciotto, 640 P.2d 746, 768 (Cal. 1982)  
22 (citations omitted). “Words used in an insurance policy are to be interpreted according to the  
23 plain meaning that a layperson would attach to them. A policy is ambiguous if it is capable of  
24 two or more reasonable constructions.” Blue Ridge Ins. Co. v. Stanewich, 142 F.3d 1145, 1147  
25 (9th Cir.1998). The purpose of this rule is to protect the insured’s reasonable expectations when  
26 the insurer controls the language of the policy. Reserve Ins., 640 P.2d at 768. Although



1 deference is generally given to arbitration provisions, they are contracts nonetheless and are  
2 subject to the rules of contract interpretation.

3 Despite Gargrave's judicious use of ellipsis and excerpts, as well as its complete failure  
4 to address the service of suit provision contained in the body of the insurance Policy, it cannot  
5 escape the fact that the relevant provisions, when viewed in context, are ambiguous and must be  
6 reconciled. Discovery is ongoing with regard to the parties' negotiation and execution of the  
7 Cover Note, the OPA insurance policy, and the COFR guaranty; however, absent such relevant  
8 information, the cannons of contract law can still guide this Court's interpretation of the contract.  
9 Under these principles, Gargrave's motion must be denied.

10 "A written contract must be read as a whole and every part interpreted with reference to  
11 the whole, with preference given to reasonable interpretations." Klamath Water Users Protective  
12 Ass'n v. Patterson, 204 F.3d 1206, 1210 (9<sup>th</sup> Cir. 1999). Under this rule, a contract must not be  
13 construed so as to render any part superfluous. Looking first to the Cover Note provision, the  
14 plain language refers to both judicial resolution and arbitration. It states "This insurance shall be  
15 governed by and construed in accordance with the laws of England and the exclusive jurisdiction  
16 of the English courts. The seat of arbitration shall be London." Under Gargrave's preferred  
17 construction, the provision would require all disputes to be resolved by arbitration, thereby  
18 ignoring the reference to the English courts. This construction is not reasonable, as it fails to  
19 give effect to the entire provision. Construing the provision as a whole in a manner that gives  
20 effect to each portion, it is evident that the Cover Note intends to give "exclusive jurisdiction"  
21 over "this insurance" to the English courts, and that only disputes falling outside the scope of  
22 that express grant of jurisdiction may be arbitrated.

23 Looking next to the service of suit clause contained in the OPA Policy, it cannot be  
24 construed as immaterial or irrelevant. The only way it too can be given effect is to construe it as  
25 a "carve-out" from the general English jurisdiction provision, one that becomes available when  
26 the underwriters fail to pay any amount claimed to be due under the policy. This understanding

1 is reasonable in light of the risk for which the insurance Policy was issued—the Policy provides  
2 coverage for OPA liability. OPA liability can arise only in U.S. waters, and thus any litigation  
3 involving such liability will be brought by the United States government in federal court. As an  
4 OPA guarantor, Gargrave acknowledged that it was insuring against risks that could occur only  
5 in U.S. waters, and for that reason, it expressly consented to be sued directly in the United States  
6 in the event of an OPA incident. It was based on these unvarying assumptions that the parties to  
7 the insurance contract intended for claims arising out of a denial of OPA coverage to be joined  
8 with any U.S. litigation brought by the United States government regarding OPA liability.  
9 Under this reasonable interpretation, which gives effect to every provision of the contract, the  
10 Marwan Cross-claims are properly before this Court.

11 Additionally, Gargrave has affirmatively waived any contract-based right to challenge the  
12 forum of the Marwan Cross-claims. “[I]t is well settled that a contracting party may unilaterally  
13 waive a provision of the contract, including, as a general rule, any condition precedent, which  
14 has been placed in the contract for his or her benefit.” 13 Williston on Contracts § 39:24. The  
15 English jurisdiction provision in the Cover Note was solely for Gargrave’s benefit, as only  
16 Gargrave resides in London. The insured vessel, the coverage area, and the situs with regard to  
17 any litigation involving a claim of OPA liability were all in the United States. By opting to raise  
18 insurance-based claims against Marwan in connection with the instant action, however, Gargrave  
19 has waived its ability to assert that the parties’ insurance-related disputes must be resolved in  
20 London.

21 Under well-established contract interpretation rules, Gargrave’s analysis is without merit.  
22 The Marwan Cross-claims must proceed to trial before this Court.

23 **2. Under English contract law, Gargrave’s motion also fails.**

24 Under English law, the English jurisdiction provision cited by Gargrave is also rendered  
25 ambiguous by the service of suit clause contained in the OPA policy. As there is no direct  
26 authority of the English court that reconciles a service of suit clause with an exclusive English

1 jurisdiction clause, general principles of English contract law apply. The overarching rule of  
2 contract interpretation in England is that the court must endeavor to give effect and a sensible  
3 commercial meaning to the contract as a whole, while seeking to reconcile competing or  
4 inconsistent terms. In Antaios Naviera SA v. Salen Rederierna AB, AC 191, 201 (1985), Lord  
5 Diplock stated that “If detailed semantic and syntactical analysis of words in a commercial  
6 contract is going to lead to a conclusion that flouts business commonsense, it must be made to  
7 yield to business commonsense.” Additionally, in the case of Jumbo King Ltd. v Faithful  
8 Properties Ltd., 2 HKCFAR 279 (1999), the court noted that the overriding objective was to give  
9 effect to what the parties intended to mean, rather than the meaning ascribed to the words by a  
10 “pedantic lawyer.”

11 The English jurisdiction clause in the Cover Note expressly refers to the exclusive  
12 jurisdiction of the English courts. It then refers to the seat of the arbitration as London. An  
13 English court will construe the provision as a grant of jurisdiction to the court, not as a  
14 requirement that any disputes be resolved by arbitration because the clause’s reference to  
15 arbitration arises only in relation to location (i.e. its seat) and not in relation to any substantive  
16 jurisdiction. The English court would likely conclude that the reference to arbitration was  
17 simply a drafting error when examined in the context of the clause as a whole. Additionally,  
18 when the English jurisdiction clause is analyzed in conjunction with the service of suit provision  
19 in the OPA policy, it is likely that the English court will adopt the analysis explained above—  
20 that the service of suit clause operates as a “carve out” from the exclusive jurisdiction clause,  
21 which, if exercised, will override the more general provision contained within the Cover Note.

22 Additionally, under English law, Gargrave has waived any application of the English  
23 jurisdiction clause by bringing cross-claims against Marwan in the United States. In Akai Pty  
24 Ltd. v. People's Insurance Co. Ltd., Lloyds Rep. 90 (1998), an English court considered the  
25 operation of Section 32 and 33 of the Civil Jurisdiction and Judgments Act 1982, which sets out  
26 relevant principles for the enforcement in England of overseas judgments obtained in breach of a

1 party's forum selection agreement. Section 32 does not require English courts to recognize a  
2 foreign judgment obtained against a party in violation of a forum selection provision; provided,  
3 however, that the party has not engaged in actions constituting a voluntarily submission to the  
4 foreign court's authority. According to the judgment in Akai,

5 [T]he question for the Court, in determining whether the steps taken by a party in  
6 an overseas Court amounts to a submission for the purposes of S.32 or S.33, is  
7 whether the step was only necessary or useful if the party was not objecting to the  
8 jurisdiction. A step that is not consistent with or relevant to the challenge to the  
9 jurisdiction or obtaining a stay will usually be a submission to that jurisdiction.

10 Id. at 97. Gargrave was in no way obligated to assert claims for affirmative relief against  
11 Marwan in connection with its defense against the underlying action, as cross-claims are always  
12 permissive. Gargrave's voluntary attempt to obtain a substantive declaration from this Court  
13 regarding the extent and nature of its obligations under the COFR guaranty and underlying  
14 insurance contract is inconsistent with a challenge to this Court's jurisdiction to resolve the  
15 Marwan Cross-claims. The substantive nature of Gargrave's own cross-claims against Marwan  
16 constitutes a waiver under English law of any rights it may have had to enforce the English  
17 jurisdiction clause contained in the Cover Note.

18 **B. A stay or dismissal of the Marwan Cross-claims will preclude Marwan from  
19 fully defending against Gargrave's cross-claims, decrease judicial efficiency, and  
20 increase the risk of inconsistent results.**

21 A forum selection clause may be set aside if enforcement would be unreasonable and  
22 unjust, or if the clause is invalid for fraud or overreaching. M/S Bremen v. Zapata Off-Shore  
23 Co., 407 U.S. 1, 15, 92 S.Ct. 1907 (1972). A court may also refuse to uphold a clause that  
24 effectively denies a party his day in court. Id. at 18. Here, due to the nature of the underlying  
25 litigation, as well as the procedural ramifications that a dismissal or stay would have on  
26 Marwan's ability to defend in this litigation, Gargrave's motion should be denied.

"Forum selection clauses can be unreasonable where there is a possibility of prejudice to  
the parties through conflicting judgments by the concurrent litigation in two courts, or when

1 forcing them to re-file subordinate claims in a separate court would be a gross waste of the  
2 parties' and the court's resources." Mylan Pharmaceuticals, Inc. v. American Safety Razor Co.,  
3 265 F. Supp.2d 635 (D.W.Va. 2002) (citing Taylor Investment Corp. v. Weil, 169 F.Supp.2d  
4 1046, 1061 (D.Minn.2001) and Ace Novelty, Inc. v. Vijuk Equip., Inc., 1991 WL 150191, at \*7  
5 (N.D.Ill. July 31, 1991)). In Mylan Pharmaceuticals, a court found that such circumstances  
6 existed, and as a result, it did not enforce an otherwise unambiguous forum selection clause  
7 negotiated by the parties. A buyer of allegedly defective cotton balls sued both the seller and the  
8 supplier in West Virginia. When the supplier cross-claimed against the seller, the seller moved  
9 to dismiss the cross-claims on venue grounds pursuant to a forum selection clause contained in  
10 an agreement between the parties. The court concluded that the nature of the litigation justified  
11 setting aside the forum selection clause:

12 Dismissing the cross claim and forcing the parties to refile in New York would not  
13 only increase their own costs, but also force the Southern District of New York to  
14 expend its resources in handling the case, by either letting it remain on its docket  
15 until this action is resolved, or... transferring it back to this Court. Such an  
16 exercise would be a gross waste of the parties' and the Court's resources.  
17 Enforcement of the forum selection clause is therefore unreasonable.

18 265 F. Supp.2d at 640.

19 Similarly, in Taylor Inv. Co. v. Weil, a court refused to dismiss one party's cross-claims  
20 pursuant to a forum selection clause when doing so would force another court to address  
21 essentially the same issues as the original action. At issue in that case was Taylor's purchase of  
22 software from CMAC (a value-added reseller offering a product originally manufactured by  
23 Geac) and its president Weil. When the software failed to perform as promised, Taylor sued  
24 CMAC, Weil, and Geac in Minnesota. Geac cross-claimed against Weil and CMAC, prompting  
25 Weil and CMAC to cross-claim against Geac. Geac then moved to dismiss Weil and CMAC's  
26 cross-claims pursuant to a Texas forum selection clause in an agreement between the parties.  
The court noted the intertwined nature of the litigation and refused to give effect to the provision.

Currently, all claims relating to the StarBuilder license agreement are joined  
before this Court. Ultimate resolution of this case will dispose of all claims among  
the parties with respect to StarBuilder. Geac essentially requests that the Court

MARWAN AND FIVE SEAS' MEMORANDUM  
IN OPPOSITION TO MOTION TO DISMISS

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1 dismiss a portion of the lawsuit and force Weil and CMAC to re-file those claims  
2 in Texas. Under these circumstances, that decision could result in either  
3 preclusion of Weil's and CMAC's claims in the Texas courts or in the potential  
4 for conflicting judgments. In addition, a decision requiring Weil and CMAC to re-  
5 file certain claims in Texas would be an inefficient use of judicial resources as  
6 well as an unnecessary waste of the litigants' resources....Retaining jurisdiction  
7 over the cross-claims of Weil and CMAC will allow this Court to fully and finally  
8 resolve all claims stemming from the StarBuilder license agreement. Enforcement  
9 of the forum selection clause in this case would be both unreasonable and  
10 potentially unjust.

11 For the same reasons that the Taylor and Mylan courts refused to give effect to a forum  
12 selection clause, this Court should deny Gargrave's motion and resolve the Marwan Cross-  
13 Claims in the instant suit. The Marwan Cross-claims are based on the same underlying facts as  
14 Gargrave's cross-claims and the United States' original claims, all of which turn on a series of  
15 events involving the M/V AJMAN 2's permission to enter and remain in Apra Harbor in August  
16 2004. Indeed, the M/V AJMAN 2 could not have even entered Apra Harbor if Gargrave had not  
17 issued the Policy and executed a COFR guaranty. The parties' claims involve the same  
18 witnesses and documentary evidence, as well as the resolution of the same material facts and  
19 issues of law.

20 Granting Gargrave's motion would also effectively deny Marwan the ability to fully and  
21 fairly defend against Gargrave's cross-claims. The Marwan Cross-claims are compulsory  
22 counterclaims to Gargrave's allegations, because they "arise out of the transaction or occurrence  
23 that is the subject matter of the opposing party's claim..." FRCP 13(a). Thus, if Marwan is  
24 precluded from raising them in this action, it may be collaterally estopped from obtaining the  
25 same relief at a later date or in a different forum. Additionally, both Gargrave and Marwan's  
26 cross-claims center on duties and obligations that arise out of OPA, a statute that is unique to the  
United States and best analyzed by a United States court. If the Marwan Cross-claims were  
litigated in England, the English court would be required to interpret and apply U.S. law and  
would compel the parties to submit expert evidence from U.S. lawyers in the form of testimony.  
This would not only increase the risk of an inconsistent interpretation of OPA, it would increase



1 the parties' costs and duplicate their efforts in the U.S. litigation. If Marwan is not permitted to  
2 raise its cross-claims claims in this action, it will be substantively and procedurally prejudiced.

3 Likewise, Gargrave is not entitled to a stay of the Marwan Cross-claims. As discussed  
4 above, the Marwan Cross-claims do not fall within the scope of the Cover Note's arbitration  
5 provision. Even if they did, however, a stay would not be warranted. In directing this Court's  
6 attention to Section 9 of the English Arbitration Act, Gargrave neglects to cite subsection (3),  
7 which precludes a party from applying for a stay of judicial proceedings "after he has taken any  
8 step in the proceedings to answer the substantive claim." Here, Gargrave has taken a much more  
9 procedurally significant step. Gargrave brought its own substantive claims against Marwan,  
10 challenging the scope and validity of the COFR guaranty and insurance contract, as well as  
11 Marwan's performance of its contractual obligations. Consequently, under the English  
12 Arbitration Act, Gargrave can not maintain that the responsive Marwan Cross-claims must be  
13 stayed.

14 There is no equitable basis for permitting Gargrave's claims against Marwan to proceed  
15 but requiring Marwan's claims against Gargrave to be stayed or dismissed. Gargrave's motion is  
16 unreasonable in light of its assertion of cross-claims seeking affirmative relief.

## 17 V. CONCLUSION

18 Gargrave has provided this Court with an incomplete picture of the parties' agreement  
19 and, as a result, it has provided this Court with incomplete analysis. The Policy terms that  
20 Gargrave hides from the Court are fundamental to the sole reason that Marwan obtained OPA  
21 insurance in the first place—to acquire a COFR guaranty and OPA insurance at the insistence of  
22 the United States government as a precondition to allowing the M/V AJMAN 2 to shelter in Apra  
23 Harbor. And it is those terms, which provide for venue in the United States courts in the event  
24 Gargrave denies coverage, that determine this motion. Moreover, by asserting positive claims of  
25 non-coverage in its own cross-claims against Marwan, Gargrave has also waived its claim of  
26 improper venue. Deciding the claims of all parties—of the United States, Gargrave, and

1 Marwan—in this lawsuit was the parties' intention under the Policy and it is the only fair and  
2 judicially efficient result. Gargrave's motion should be denied.

3 DATED this 6<sup>th</sup> day of March, 2007.

4 **CAIRNCROSS & HEMPELMANN, PS**

5 **TEKER TORRES & TEKER, P.C.**

6  
7  
8 By   
9 **LAWRENCE J. TEKER, ESQ.**

10 Attorneys for Defendants, Marwan Shipping &  
11 Trading Co., Sharjah, Five Seas Shipping Co.,  
12 LLC, Sharjah, and Al-Buhaira National  
13 Insurance Co.

**CERTIFICATE OF SERVICE**

The undersigned certifies under the penalty of perjury according to the laws of the United States and the State of Washington that on this date I caused to be served in the manner noted below a copy of this document entitled **MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO GARGRAVE SYNDICATE 2724'S MOTION TO DISMISS CROSS-CLAIM OR ALTERNATIVELY TO STAY THE CROSS-CLAIM** on the following individuals:


R. Michael Underhill, Mimi Moon Torts Branch, Civil Division US Department of Justice 450 Golden Gate Avenue, Room 7-5395 PO Box 36028 San Francisco, CA 94102-3463	Forrest Booth Ryan Donlon Severson & Werson One Embarcadero Center, 26 <sup>th</sup> Floor San Francisco, CA 94111
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☐ Via First Class Mail

☒ Via Messenger

☒ Via E-mail

DATED this 6<sup>th</sup> day of March, 2007, at Hagåtña, Guam.

  
LAWRENCE J. TEKER

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